# Supreme Court of the United States.

OCTOBER TERM, 1869.

No. 154.

JAMES C. FARGO, as President of the American Express Company,

*Appellant,*

vs.

WILLIAM H. HART, Auditor of State of the State of Indiana.

## BRIEF FOR APPELLANT.

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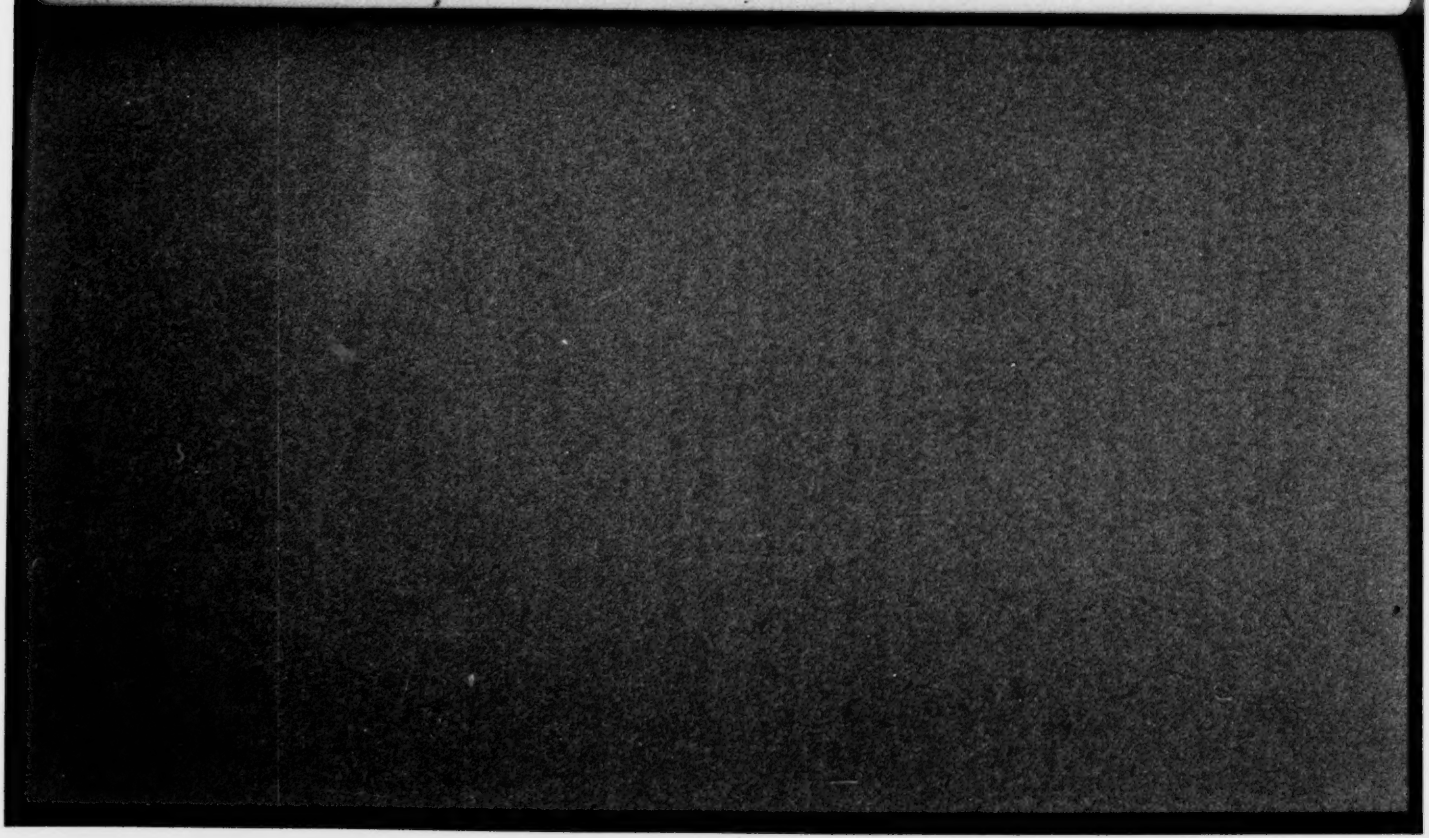

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Appellant,

vs.

WILLIAM H. HART, Auditor of State of the State of Indiana,
Appellee.

This is an appeal from a decree of the Circuit Court of the United States for the District of Indiana, dismissing the appellant's bill.

The question involved relates to the administration, by the taxing authorities of the State of Indiana, of the law, the constitutional validity of which, and of similar laws providing for the taxation of the property of express companies, was the subject of examination by this Court in several cases arising in Kentucky, Ohio and Indiana.

Adams Express Co. vs. Ohio, 165 U. S., 194.
American Express Company vs. Indiana, *Ib.*, 255.
Adams Express Company vs. Kentucky, 166 U. S., 171.
Adams Express Company vs. Ohio, on petition for rehearing, 166 U. S., 185.

The question raised in those cases was whether the system of taxation provided by these laws violated the Constitution of the United States. The decision upheld the validity of the legislation. The question

raised in the present case is whether the practical administration of these laws by the taxing authorities of the State deprives the express company of rights secured to it by the Constitution.

A statement of the nature of the former controversy will aid to an understanding of that which is now presented.

The legislation assailed did not impose a franchise or privilege tax. The tax which it provided for was plainly a tax on *property*. The controversy was as to whether, under the guise of a tax upon property within the State, the legislation, by reason of the method employed for arriving at a valuation of such property, did not, in fact, impose a tax upon property having a situs without the State, and not subject to its taxing power.

The system provided was that which has become known as the "unit system." Adopted by the States, and sustained by this Court as a method of taxing railroad property (Maine vs. Grand Trunk Railway, 142 U. S., 217; Pittsburgh, &c., Railway vs. Backus, 154 U. S., 421) and sleeping car companies (Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S., 18) it has been extended to the property of telegraph companies (Western Union Tel. Co. vs. Taggart, 163 U. S., 1), and by the decisions above referred to was sustained in its application to express companies. Its principal features were the valuation of the entire property of the company, wherever located, as a unit profit-producing plant, the aggregate market value of all the stock and bonds of the company being taken to establish the value of its entire property, and it was held that a fair proportion of this value, so ascertained, might be imputed to the property of the company within the taxing State, and that such fair proportion might be determined upon a mileage basis, thus imputing to the property within the State a proportion of the value of the total property equal to the proportion between the number of miles operated in such State and the total number of miles everywhere operated by the company.

The theory upon which such a system of valuation was applied to railroad property was based upon the proposition that in the case of a railroad line running through several States, each part of the road, in its relation to all other parts, possessed elements of value which it would not have if separated and segregated from the system and considered as an independent line of itself. The theory was that no better measure of value for the entire property could be taken than the amount which people were willing to pay for it, and that this value being represented in its securities, the aggregate value of the entire property was fairly measured by the aggregate market value of all the securities of the company. As to the apportionment of a part of this aggregate value of the whole to that portion of the line lying within the taxing State, this Court held that, in the absence of peculiar or exceptional circumstances, a mileage basis of apportionment was fair enough.

It was evident that there was an important distinction in the nature of things between the properties of railroad and telegraph companies on the one hand, and express companies on the other, and when the case of the express companies was presented to this Court, this distinction led to much argument and to a strong difference of opinion between the members of the Court, who were nearly evenly divided upon it.

In the case of a railroad or a telegraph company, there is a physical, tangible, profit-producing plant or system, the value of each part of which is undoubtedly affected and enhanced by the correlation between all parts of the whole; and to ascertain in any given case the exact relative value of each part, and to ascertain how much it contributes to the value of each other part and to the value of the whole, might well be a hopeless task. The unity in such a case is a unity of plant, of system, of operation; the whole property is devoted as a unit to a single purpose, and is incapable of division.

In the case of express companies, however, there is no such tangible, physical plant. There is nothing

which has a fixed and permanent situs. The business in which they are engaged is in its nature not the operation of a plant, but the rendering of services. They have no means of transportation of their own, but employ the facilities of railroad companies and other carriers for the forwarding of goods. The only property which they have in actual use in the business itself consists of horses, wagons, safes and office furniture, and these instrumentalities have, in fact, a definite and ascertainable value, as property, which is the same as that which may be attributed to similar horses, wagons, safes and office furniture owned by other people, and it was therefore claimed that to impute to them an enormously enhanced value based upon the value at which the business of the company and all its assets could be sold, as evidenced by the market value of its securities, would be, in substance and in fact, to import into the taxing State values not within its jurisdiction, and that an assessment upon property within the State at such enormously enhanced values would be, in substance and in fact, a taxation of property situated without the State.

The majority of the Court, however, declined to recognize this distinction as controlling, and sustained the legislation, holding that, while the physical unity which existed in the case of railroad and telegraph companies was lacking, there was, nevertheless, in the case of the property of express companies, a unity of use which would justify a system of taxation which viewed their property as a single unit and allotted to each State a fair proportion thereof.

It was claimed by the express companies in these cases that they possessed a large amount of real estate, stocks, bonds and other investments, all of which were tangible property which had a definite and actual situs in other States than Ohio, Kentucky and Indiana, and that the necessary result of such a view would be to subject this foreign situated tangible property to taxation in Ohio, Kentucky and Indiana.

This objection was forcibly pressed upon the Court

in the petition for a rehearing. In the original opinion, Mr. Chief Justice FULLER had said (165 U. S., 227):

> "There is here no attempt to tax property "having a situs outside of the State, but only to "place a just value on that within. Presump- "tively all the property of the corporation or "company is held and used for the purposes of "its business, and the value of its capital stock "and bonds is the value of only that property so "held and used.
>
> "Special circumstances might exist, as indicated "in Pittsburgh, Cincinnati, &c., Railway v. Backus, "154 U. S., 421, 423, which would require the "value of a portion of the property of an express "company to be deducted from the value of its "plant as expressed by the sum total of its stock "and bonds before any valuation by mileage "could be properly arrived at, but the difficulty "in the cases at bar, is that there is no showing "of any such separate and distinct property which "should be deducted, and its existence is not to "be assumed. It is for the companies to present "any special circumstances which may exist, and, "failing their doing so, the presumption is that "all their property is directly devoted to their "business, which being so, a fair distribution of "its aggregate value would be upon the mileage "basis."

Upon the application for a rehearing, Mr. Justice BREWER said (166 U. S., 217):

> "The importance of the questions involved, the "close division in this court upon them, and the "earnestness of counsel for the express companies "in their original arguments, as well as in their "briefs on this application, lead those of us who "concurred in the judgments to add a few ob- "servations to what has hitherto been said."

After saying that the statutes in question contemplated only an assessment and levy of taxes upon the property of the express companies situated within the respective States, he said:

"The only really substantial question is "whether, *properly understood and administered*, "they subject to the taxing power of the State "property not within its territorial limits. The "burden of the contention of the express com- "panies is that they have within the limits of the "State certain tangible property, such as horses, "wagons, etc.; that that tangible property is "their only property within the State; that it "must be valued as other like property, and upon "such valuation alone can taxes be assessed and "levied against them.

"But this contention practically ignores the ex- "istence of intangible property, or at least denies "its liability for taxation. In the complex civili- "zation of to-day a large portion of the wealth of "the community consists in intangible property, "and there is nothing in the nature of things or "in the limitations of the Federal Constitution "which restrains a State from taxing at its real "value such intangible property. * * * Now, "whenever separate articles of tangible property "are joined together, not simply by a unity of "ownership, but in a unity of use, there is not in- "frequently developed a property, intangible "though it may be, which in value exceeds the "aggregate of the value of the separate pieces of "tangible property. Upon what theory of sub- "stantial right can it be adjudged that the value "of this intangible property must be excluded "from the tax lists, and the only property placed "thereon be the separate pieces of tangible prop- "erty."

"The first question to be considered therefore "is whether there is belonging to these express

" companies intangible property—property differ-
" ing from the tangible property—a property
" created by either the combined use or the man-
" ner of use of the separate articles of tangible
" property, or the grant or acquisition of fran-
" chises or privileges, or all together. To say that
" there can be no such intangible property, that
" it is something of no value, is to insult the com-
" mon intelligence of every man."

After saying that it is a cardinal rule that should never be forgotten that whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation, Mr. Justice BREWER continues :

" Suppose an express company is incorporated
" to transact business within the limits of a State,
" and does business only within such limits, and,
" for the purpose of transacting that business,
" purchases and holds a few thousands of dollars'
" worth of horses and wagons, and yet it so meets
" the wants of the people dwelling in that State,
" so uses the tangible property which it possesses,
" so transacts business therein that its stock be-
" comes in the markets of the State of the actual
" cash value of hundreds of thousands of dollars.
" To the owners thereof, for the purposes of in-
" come and sale, the corporate property is worth
" hundreds of thousands of dollars. Does sub-
" stance of right require that it shall pay taxes
" only upon the thousands of dollars of tangible
" property which it possesses ? * * *

" A distinction must be noticed between the
" construction of a state law and the power of a
" State. If a statute, properly construed, con-
" templates only the taxation of horses and
" wagons, then those belonging to an express
" company can be taxed at no higher value than
" those belonging to a farmer. But if the State
" comprehends all property in its scheme of taxa-

" tion, then the good-will of an organized and " established industry must be recognized as a " thing of value. The capital stock of a corpora- " tion and the shares in a joint stock company " represent not only the tangible property, but " also the intangible, including therein all cor- " porate franchises and all contracts, privileges " and good-will of the concern."

He then takes up the case of the Adams Express Company and shows that, according to the returns filed with the State Auditor of Ohio, the market value of the company's stock was over $16,000,000, but that the only tangible property returned amounted to about $4,000,000. He continues:

" The Adams Express Company has, according to " its showing, in round numbers $4,000,000 of " tangible property scattered through different " States, and with that tangible property thus " scattered transacts its business. By the busi- " ness which it transacts, by combining into a " single use all these separate pieces and articles " of tangible property, by the contracts, franchises " and privileges which it has acquired and pos- " sesses, it has created a corporate property of the " actual value of $16,000,000. Thus, according to " its figures, this intangible property, its fran- " chises, privileges, etc., is of the value of $12,- " 000,000, and its tangible property of only $4,- " 000,000. Where is the situs of this intangible " property? Is it simply where its home office is, " where is found the central directing thought " which controls the workings of the great ma- " chine, or in the State which gave it its corporate " franchise; or is that intangible property dis- " tributed wherever its tangible property is " located and its work is done? Clearly, as we " think, the latter. Every State within which it is " transacting business and where it has its prop-

" erty, more or less, may rightfully say that the
" $16,000,000 of value which it possesses springs
" not merely from the original grant of corporate
" power by the State which incorporated it, or
" from the mere ownership of the tangible prop-
" erty, but it springs from the fact that that tangi-
" ble property it has combined with contracts,
" franchises and privileges into a single unit of
" property, and this State contributes to that
" aggregate value not merely the separate value
" of such tangible property as is within its
" limits, but its proportionate share of the
" value of the entire property. That this is
" true is obvious from the result that
" would follow if all the States other than the one
" which created the corporation could and should
" withhold from it the right to transact express
" business within their limits. It might continue
" to own all its tangible property within each of
" those States, but unable to transact the express
" business within their limits, that $12,000,000 of
" value attributable to its intangible property
" would shrivel to a mere trifle.

* * * * * *

" It is said that the views thus expressed open
" the door to possibilities of gross injustice to
" these corporations, through the conflicting action
" of the different States in matters of taxation.
" That may be so, *and the courts may be called*
" *upon to relieve against such abuses.*"

* * * * * *

In answer to the suggestion that the company might have a large amount of investments situated without the taxing States, Mr. Justice BREWER, speaking for the majority of the Court, said (166 U. S., 222) :

" It is suggested that the company may have
" bonds, stocks or other investments which pro-
" duce a part of the value of its capital stock, and

" *which have a special situs in other States* or are " exempt from taxation. If it has, let it show the " fact. Courts deal with things as they are, and " do not determine rights upon mere possibilities. " If half of the property of the Adams Express " Company, which by its own showing is worth " $16,000,000 and over, is invested in United " States bonds, and therefore exempt from taxa- " tion, or invested in any way outside the busi- " ness of the Company and so as to be subject to " purely local taxation, let that fact be disclosed, " and *then* if the State of Ohio attempts to in- " clude within its taxing power such exempted " property, or *property of a different situs*, it " will be time enough to consider and determine " the rights of the company. That if such facts " exist they must be taken into consideration by a " State in its proceedings under such tax laws as " are here presented has been heretofore recog- " nized and distinctly affirmed by this court. " *Pittsburgh, Cincinnati, &c., Railway Co. v.* " *Backus*, 154 U. S., 421, 443; *Western Union* " *Telegraph Co. v. Taggart*, 163 U. S., 1, 23; " *Adams Express Co. v. Ohio*, 165 U. S., 194, 227. " Presumably all that a corporation has is used in " the transaction of its business, and if it has " accumulated assets which for any reason affect " the question of taxation, it should disclose them. " It is called upon to make return of its property, " and if its return admits that it is possessed of " property of a certain value, and does not dis- " close anything to show that any portion thereof " is not subject to taxation, it cannot complain if " the State treats its property as all taxable."

It may be said, in explanation of the failure of the express companies more fully to disclose the amount of their tangible property in the cases which were thus decided by this Court, that the question involved in those cases was not so much the administration of the

tax law by the State officials as the constitutionality of the law itself.

Immediately after the decision, the American Express Company, in the hope, which we regret to say has not been justified, that the State Board of Tax Commissioners of Indiana would be guided in their official action by the expressions of this Court from which we have freely cited, determined to make a full disclosure to those authorities of all facts and circumstances bearing upon their property.

Accordingly, the company prepared a return of its condition on the first of April, 1898, and filed the same with the State Board. This return contained all the information and statistics required by the State Law, and in addition a full statement of its property and its nature. The assessed value of all the tangible property of the company in Indiana was $16,015.

It appeared affirmatively on the face of the return that the company possessd intangible property in real estate, stocks, bonds, securities and investments exceeding the aggregate market value of its entire capital stock, and that *therefore, the market value of its capital stock included no intangible property whatever.*

The only result of the frank disclosure made by the company was the imposition by the State Board of an assessment of $809,253, being at the rate of $450 per mile upon its Indiana mileage, *an assessment nearly twice as great as that which was before this Covrt in the cases already decided*, which was at the rate of $250 per mile.

Within the time allowed by the law of Indiana for a review of assessments, the company appeared before the board and protested by counsel and by filing written protests, all to no purpose. The return which the company made specifically called the attention of the board to the opinions of this Court rendered by Mr. Chief Justice FULLER and Mr. Justice BREWER, as furnishing the foundation for the company's contention that its physical, tangible property situated outside of the State of Indiana had a

definite local situs and was subject to local taxation where situated, and that the value thereof could not be included in the estimate to be made by the board of its property within the State of Indiana; and, moreover, that all but a very small proportion of this foreign-situated property was not used in the business of the company, and constituted no part of its express plant, but *consisted of* investments by the company, the results of the accumulation of earnings through a series of years, and that they were held for mere investment purposes, in like manner as similar properties are held for investment by persons not engaged in the express business.

Similar proceedings took place in respect to the assessments for 1899, 1900, and 1901. In each year the company filed a return, carefully drawn and giving full information as to its property. In each year, too, it protested and applied for a modification of the assessment. It offered to exhibit to the board, or any authorized agent, the securities held by it in the safe deposit vaults in New York.

During these years the condition of the company changed, from time to time. There was a material difference in the value of its capital stock between 1898 and 1901. The amount of its assets also changed. The proportion of its mileage in the State of Indiana to its total mileage changed. None of these changes had any effect upon the action of the board. Each year they made and adhered to the same arbitrary assessment of $450 a mile.

The proceedings of the State Board for each year are embodied in the record. Appropriate reference will be made to them hereafter. At no time was any demand or request made by the Auditor of State, or any member of the board, upon the company for a further showing of facts than was made in its annual returns for the years involved, except only as appears from the record of what took place at the annual session of the board, which is also embodied in the record (Record, p. 306).

The bill in this case was filed by James C. Fargo, as president of the American Express Company, in the Circuit Court of the United States for the District of Indiana, against Americus C. Daily, as Auditor of State of the State of Indiana, to restrain the certification to the respective county auditors of the assessment for the year 1898, to procure an adjudication that the assessment was void and to set aside the lien thereby attempted to be created upon the property in Indiana as a cloud on the title. The bill sets forth that the complainant Fargo is a resident of New York, that the defendant is a resident of Indiana; it sets forth the nature of the American Express Company, which is not a corporation but a partnership association conducting the express business; it exhibits the return made by the company the particulars of which will be hereafter stated, the making of the preliminary assessment thereon by the board, the protest by the company, setting forth its objections thereto upon constitutional grounds, and alleges that the assessment was in violation of the interstate commerce clause of the Constitution and of the fourteenth amendment, as depriving the members of the express company of their property without due process of law, in that it assessed for taxation purposes in Indiana tangible property having a definite situs without the State, and amounted to a denial of the equal protection of the law; alleges that under the laws of Indiana the assessment will cast a cloud upon the title to the company's real estate, and that the bill is filed to prevent multiplicity of suits through the bringing of numerous suits in each of the various counties of the State for the collection of taxes, or actions by the company to restrain such collection.

By stipulations between the parties the assessments of 1899, 1900 and 1901 were made the subject of supplemental bills. The State interposed demurrers to the bills which were overruled, and thereafter answers were interposed and issue joined.

A word may be said here upon a point which will be

further referred to. In the returns of the company for the years under consideration, it included in its statement of total mileage a large number of ocean routes upon which it conducted the express business. This, of course, very largely reduced the percentage of mileage in the State of Indiana. In the proceedings before the State Board, exception was taken to the company's embracing these ocean routes in its statement of total mileage, largely for the reason that it had not included them in the reports for former years. This, however, was explained on behalf of the company by the fact that shortly prior to 1898 it had made a change in the method of conducting its European and other foreign business, and established its own offices in Europe, and made arrangements with various steamship lines, so that, in consequence of such change, the whole business was conducted in substantially the same way as its other express business was conducted.

A preliminary injunction having been granted, the cause came on for final hearing and the bills were dismissed, the Court holding

1. That the Indiana Statute was constitutional.

2. That the question whether ocean route mileage should be included as part of the total mileage of the company, and also the question of the value of the company's property in Indiana, were questions exclusively for the determination of the State Board; that its determination could not be overturned by inquiring whether the Board gave proper weight to evidence before it; that the finding of the Board in these respects could not be set aside in the absence of fraud, which was not charged; and that the Court would not be justified by the evidence in assigning fraud or bad faith to the Board, its error, if any, being an error of judgment unmixed with fraud, in making an excessive valuation of the company's route in Indiana (Record, p. 126).

## Assignment of Errors.

The Assignment of Errors is found at page 127 of the Record.

The following will be insisted upon in argument:

I. That the action of the State Board of Tax Commissioners was in violation of the Fourteenth Amendment of the Constitution.

II. That the same was in violation of the Interstate Commerce Clause of the Constitution.

III. That the said board either included in the assessment of the company's property in Indiana the value of tangible property having a definite situs without that State, or imposed upon the company an arbitrary assessment as a condition of its transacting its interstate business in the State of Indiana.

IV. That the Court erred in dismissing the bills and in holding that the question presented was merely one of excessive valuation.

V. That the Court erred in holding that the question of the amount of the company's total mileage was a matter for the exclusive determination of the board.

VI. That the Court erred in holding that the board's determination upon these points could not be attacked, except for fraud, and that fraud was not alleged or proved, and that it erred in not holding that the company was entitled, under the Indiana statute to include its ocean routes in the amount of its total mileage.

## ARGUMENT.

### First Point.

That no State can tax tangible property owned by a non-resident, and having an actual situs without the State, cannot be doubted. It is a principle which has again and again been affirmed by this Court, that such taxation is a taking of property without due process of law.

Louisville, etc., Ferry Co. vs. Kentucky, 188 U. S., 385.
Adams Express Company vs. Ohio, 165 U. S., 194.
Adams Express Company vs. Kentucky, 166 U. S., 171.
Adams Express Company vs. Ohio, 166 U. S., 185.
Pittsburgh, etc., Ry. Company vs. Backus, 154 U. S., 421.
Cleveland, etc., Ry. Company vs. Backus, 154 U. S., 439.

It matters not whether legislative authority exists for the illegal act, or whether it is done in pretended pursuance of such authority, or whether it is confessedly a bare-faced exercise of arbitrary power. It is the thing itself which may not be done.

In Reagan vs. Farmer's Loan & Trust Co., 154 U. S., 362, 390, this Court, speaking by Mr. Justice BREWER, said:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of

that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

The Indiana statute for the taxation of express companies, as construed by the highest Court of the State, does not contemplate or authorize the taxation of tangible property having a situs without the State (State of Indiana vs. American Express Company, 144 Ind., ; Western Union Telegraph Company vs. Taggart, 141 Ind., ); and, as thus construed, its validity has been upheld by this Court.

It is, therefore, not the validity of the statute, but the administration of it by the State officials which we attack in the present suit. If, as matter of fact, these officials in making the assessment included therein and assessed as part of the property within the State, actual tangible property having a definite situs without the State, then they went beyond the powers conferred by the statute and worked an illegal trespass upon the property rights of the appellant's company, which it is as much entitled to restrain as if it had been specifically authorized by an unconstitutional statute.

Cummings vs. National Bank, 101 U. S., 153.
Yick Wo. vs. Hopkins, 118 U. S., 356.

## Second Point.

The ultimate justification by this Court of its view that the property of express companies may legitimately be considered a unit for purposes of taxation, is that thereby the State is enabled to tax the good

will or earning power—what Mr. Justice BREWER calls the *intangible* property.

It is submitted with a good deal of confidence that, in the nature of things, the theory cannot go further than that.

The Court has been careful, in a number of cases involving railroad taxation, to draw attention to the fact that there may be exceptional cases in which even that class of property may not be assessed on the mileage basis upon the theory that the whole property is a single unit, without violating the rule which confines the taxing power of the State to property within its limits.

As instances of such exceptional cases it has given the case of a railroad situated in more than one State and having in one State extensive terminals of great value, and no property of corresponding value in the other; or having an accumulation of rolling stock in one State wholly out of proportion to that which is in the other. These are circumstances, it is said, which the taxing authority is bound to take into consideration.

The instances given are of an excessive value of the *physical plant* in one State, with no corresponding value in that portion of the plant situated in the taxing State, the entire plant being a physical unit.

But in the case of express companies there is no such physical unit, unless it be deemed to consist of the horses, wagons, safes and other chattels, which may be generally described as equipment.

The unity which this Court found to exist in the express company cases was not a physical unity. The idea of such a unity was expressly disclaimed by the Court. What it did find to exist was a unity of use, through which the business of the company in each State was aided, developed and strengthened by its business in every other State. It was in this sense that the Court held that the unit theory of taxation might be legitimately applied to express companies.

What was this in substance but saying that the good-

will of the business might be apportioned among the States as a proper subject of taxation?

Upon the decision of the motion for re-argument, the majority of the Court made its position still more plain upon this point. The entire opinion of Mr. Justice BREWER is devoted to showing that what may be rightly reached by such a system of taxation in relation to express companies is their *intangible* property—that is, their good-will, franchises, contracts, privileges and the like. His whole argument has for its object to demonstrate that the legitimate effect of such legislation, properly construed, as applied to these companies, is to tax that *intangible* value which is found in the excess of the market value of the entire capital stock of the company over the value of its *tangible* property—and it is precisely for the reason that it taxes only this *intangible* property or good-will, which because it is *intangible* is incapable of having an actual situs, that such a law is not open to the charge of taxing property situated beyond the taxing power of the State.

It matters not whether the tangible property be used in the business or not. If it be tangible property, actually situated without the State, any attempt by the State to tax it must fail.

The stocks and bonds owned by the American Express Company and kept by it in a safe deposit vault in the City of New York, are capable of, and have, an actual situs. And this, whether they are employed in the business of the company or not.

Its real estate in other states, whether used for express purposes or not, certainly has an actual situs, and is exempt from taxation by Indiana.

What difference can it make in the power of Indiana to tax these *tangible* personal and real properties, situated beyond its boundaries, that the ownership of them by the company may enhance its credit and enable it for that reason more successfully to prosecute its business?

Those properties are not increased in value by the fact that they are owned by a company which carries

on a large express business in many states. They have in themselves a well defined and ascertained market value, and are worth just so much and no more, by whomsoever they may be owned.

If the company's credit is enhanced and its business capacity increased by the fact that it owns a certain amount of such securities and real estate, this circumstance may, indeed, result in the creation of an intangible value or property, a fair proportion of which may be properly assessed by the State of Indiana, under this legislation, as interpreted by this Court, but this is not because these *tangible* properties are used in the business, but because the company possesses certain *intangible* property or good-will which may be justly apportioned among the various states in which its business is carried on—each being entitled to tax a fair proportion of it.

## Third Point.

The State Board, in assessing the property of the company within the State, *did, intentionally and knowingly, include the value of its tangible property having a definite and actual situs without the State. The question presented, therefore, is not one of excessive valuation by a board having jurisdiction to make an assessment, but one of action without any jurisdiction whatever.*

A. *The statute, under which they were acting, in terms, required them to do so.*

The Tax Act, as amended in 1893, required every express company to make annually, to the Auditor of State, a return as of April 1st, showing:

1. The total capital stock.

2. The number of shares issued.

3. Its principal place of business.

4. The market value of the shares, and, if they have none, then the actual value.

5. The location and assessed value of its real estate, structures, fixtures and appliances in Indiana.

6. The location and assessed value of its real estate situated outside of Indiana, and not used directly in the conduct of the business.

7. Mortgages upon its property.

8. (*a*) "The total length of the lines or routes over which such company * * * transports such merchandise, freight or express matter."

(*b*) The total length of such lines or routes as are outside the State of Indiana.

(*c*) The length of such lines or routes within each of the counties and townships within the State of Indiana.

See Horner's Annotated Statutes, § 6521*m*.

It is then made the duty of the auditor to examine such return, "and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of State shall call for" (*Ib.* § 6521*o*).

The auditor shall then upon the meeting of the State Board of Tax Commissioners "lay such statements, with such information as may have been furnished him, before said board * * *, who shall thereupon value and assess the property of each company * * * in *the manner hereinafter set forth*, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said company * * * to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to

ascertain the true cash value of such property" (*Ib.* § 6521*p*).

Then follow directions concerning the manner of assessment:

> "Said board * * * shall first ascertain the true cash value of the *entire property* owned by said company * * * from said statements, or otherwise, *for that purpose taking the aggregate value of all the shares of capital stock in case such shares have a market value,* and in case they have none, taking the actual value thereof. * * *
>
> "Said board * * * shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain from said statements, or otherwise, the assessed value for taxation in the localities where the same is situated of the several pieces of real estate situate without the State of Indiana, and not specifically used in the general business of such company * * * which said assessed value for taxation shall be by said board deducted from the gross value of the property, as above ascertained. Said Board * * * *shall next ascertain and assess* the true cash value of *the property* of such company * * * *within the State of Indiana, by taking the proportion of the whole aggregate value of said company * * * as above ascertained,* after deducting the assessed value of such real estate without the State, * * * *which the length of lines or routes within the State of Indiana bears to the whole length of the lines or routes of such company * * * and such amount so ascertained shall be deemed and held as the entire value of the property of said company * * * within the State of Indiana.*
>
> "From the entire value of the property within the State so ascertained there shall be deducted by the said board the assessed value for taxation

> of all the real estate, structures, machinery and appliances within the state * * * *and the residue of such value so ascertained*, after deducting therefrom the assessed value of such local properties, *shall be by said board assessed to said association.*" *Ib.*, 6521, q.

The board is then to ascertain "the value per mile of the property of such company * * * within the State of Indiana" by dividing this resultant value by the number of miles within the State, and this is to be apportioned to the various counties upon a mileage basis.

*Ib.*, §§ 6521, r; 6521, s.

Such are the provisions of the act under which the assessments in controversy were made. Can anything more inflexible and rigid be imagined?

According to its plain terms, no room is left for the exercise of judgment or discretion by the board.

The market value of the stock, if it have one, is made the sole test of the valuation to be made of the company's entire property.

A specific deduction is directed of foreign situated real estate, not used directly in the conduct of the business—and that at its assessed and not at its actual or market value, although it must be plain that it is at the latter that it enters as a factor into the establishment of a market value of the stock.

Next comes the direction to ascertain the property within the State by assigning to the State an amount of the whole property as thus ascertained, by apportioning it through an absolutely rigid mathematical process upon a ratio of mileage within the State to total mileage.

The exercise of such judgment and discretion in exceptional cases, as this Court has repeatedly declared is necessary to save such laws from condemnation, as providing in substance and effect for a taxation of property without the State, is forbidden by this Indi-

ana statute: for it would be a plain disregard of its distinct and explicit commands.

B. Our present proposition that the law under which the board acted required them to value tangible property situated without the State, is not satisfactorily answered by saying that the Supreme Court of Indiana, by a strained construction of the act, may have saved it from condemnation on constitutional grounds by holding that it was not intended to prevent the board from "taking into consideration" such exceptional circumstances as might be presented to them *(Western Union Tel. Co. vs. Taggart, 141 Ind.)*.

Of what avail is it to the company taxed that the board "consider" its situation if the result is to be precisely what it would have been without such "consideration"?

The statute contains no directions to the board to make any deductions by reason of such "consideration." As we have seen, its directions are positive and distinct. It prescribes in terms a rigid, mathematical process according to which the board is directed to compute the assessment; and what likelihood is there of any State officers acting under such a statute, departing from its express directions in order to save the constitutional rights of non-resident corporations and associations?

Do not the facts in the case at bar testify most cogently to the utter worthlessness of such protection from wrong and injustice?

C. Not only did the statute in terms require the foreign situated tangible property to be included in the assessment, but that it was in fact so included is admitted by the pleadings.

The bill set forth the protest of the company to the

State Board (Record, p. 10), and alleged that it was true (Record, p. 13), and charged its statements as independent allegations of the bill (p. 13).

In the fourth paragraph of this protest it was alleged that the "assessment includes property which is not and never has been physically within the State of Indiana, and which is not and never has been within the jurisdiction of the State of Indiana for purposes of taxation;" and in the eighth paragraph of the protest the facts relating to this were set forth in detail (p. 11).

The bill further alleged (p. 16), that the assessment included "personal property of said company owned and held by said company and physically situate in the City of New York in the State of New York, and not used by it in connection with its express business and forming no part of its express business plant."

The answer (p. 54) admits the filing of the protest. It contains no specific denial of the matters alleged in the protest, but says (p. 56): "that if the American Express Company possessed stocks and bonds of corporations and companies, bills receivable, mortgage bonds and moneys loaned on collateral, as stated in the bill and supplemental bill, the same was held, employed and used by said complainant for the purpose of transacting its express business, and that such personal property and securities were necessarily and properly used and employed in maintaining and continuing said business," and, again, at the foot of page 56:

> "That said fifteen and a half million dollars in securities is held and used by the American Express Company as a part of the necessary capital of its business, and is employed in the management of said business, and is essential to its profitable continuance.
>
> "That so much of said capital as is invested in securities of the kind named in said bill and supplemental bill is used and employed not only in and for the City and State of New York, but

generally in the management and conduct of the business of said co-partnership, and that such securities form a part of its capital and business, and are in constant use wherever said company does business, both in the State of Indiana and elsewhere throughout the United States."

And the only denial that these securities were in fact assessed by the board is found at page 58:

> "Said defendant denies that said assessment * * * assesses for taxation purposes in Indiana personal property of said American Express Company owned or held by it in the City of New York and State of New York, *which was not used by said company in connection with its express business in Indiana or elsewhere*, as stated in said bill and supplemental bill of complainant."

Tested by ordinary rules of common sense, what is the meaning of these allegations and of this denial?

Are they open to any other construction than the board did in fact assess these foreign-held and foreign-situated tangible properties, and sought to justify their action on the ground that they contributed to the company's credit and were, therefore, *used* in the business and constituted a part of the unit which the board was to value?

D. Furthermore, the proceedings of the State Board show that, as matter of fact, the value of this foreign tangible property was included in the assessment.

1. The return made by the company for 1898, in addition to the statements required by the statute, specifically stated (Record, p. 268):

That the company was "the owner of a large amount of tangible property which constitutes no part of its plant for the transaction of the express business, and all of which has an actual situs without the State of Indiana. Said property so owned by it consists of both real and personal property. The real estate is situated in New York, Massachusetts and other States, and the personal property is, and for many years has been, actually situated in the City of New York, where the company has its principal office and where the said personal property is subject to local taxation."

It then proceeded to show that these foreign situated properties were of the following market value :

| | | |
|---|---|---|
| Real estate not used in the business | | $1,983,534 30 |
| Personal property, stock, bonds and other securities and money loaned on collateral, none of which were used in the express business | | 15,501,344 33 |
| Real estate used in connection with the business for offices, stables, &c. | | 3,076,438 00 |
| Personal property, constituting equipment, horses, wagons, supplies, &c., &c. | $1,505,738 72 | |
| Of which there was in Indiana less than | 8,000 00 | 1,497,738 72 |
| Total | | $22,059,055 35 |
| While the market value of the capital stock, $18,000,000 @ 120, was | | *21,600,000 00* |
| Leaving as the *excess of tangible property situated outside of Indiana, above the entire market value of the capital stock* | | 459,055 35 |

The return then continued (Record, p. 269):

> "As appears from this return and the foregoing statements therein contained, the American Express Company on the first day of April, 1898, was the owner and in possession of actual tangible property, situated outside of the State of Indiana, of a market value exceeding the market value of the entire aggregate interests of the associates who are its members, and it claims that the State Board of Tax Commissioners of Indiana have no right or authority in law to assess its property in the State of Indiana under the Act of March 6th, 1893, under which this report is made, at any sum whatever, for that it is their duty in proceeding under said act to deduct from the market value of the aggregate interests of the associates the actual value of all the real estate belonging to said Company, situated outside of the State of Indiana, and of all the tangible personal property belonging to said Company, and situated outside of said State."

It then (p. 270) referred to the opinions of Mr. Chief-Justice FULLER and Mr. Justice BREWER, in the express company cases reported in 165 U. S. and 166 U. S. as furnishing the ground upon which the company's claim was founded.

Upon the filing of this return, no further return or information was asked from the company.

Upon the return as filed, the board assessed the company's property in Indiana at $450 per mile, which for its 1,798.34 miles of express routes within the State, *amounted to the enormous sum of $809,253.*

The company filed a protest again insisting upon the deduction of foreign assets, and declaring that the assessment, as made, included them (Record, p. 10).

It also appeared before the board by counsel, and argument was made upon the question as to whether the foreign assets must not be excluded—at least to the extent of the investment securities in New York, not used in the business.

The sole result was an inquiry by the chairman as to how large a tax that would give Indiana:

"THE CHAIRMAN: Have you figured that out, Mr. Daniels?

"MR. DANIELS: Yes.

"THE CHAIRMAN: What do you get as a result?" (Record, p. 203).

Then the chairman asked what other States have a similar statute to Indiana, and what the assessment was in those States: Ohio and Kentucky.

Then the following colloquy:

"COMMISSIONER BUSKIRK: Mr. Daniels, do you say your capital stock is $18,000,000?

"MR. DANIELS: Yes.

"COMMISSIONER BUSKIRK: And its market value was, on the first day of April, how much?

"MR. DANIELS: $1.20, making $21,600,000.

"COMMISSIONER BUSKIRK: What amount do you say should be deducted from that because it is not used in your express business?

"MR. DANIELS: $15,000,000.

"COMMISSIONER BUSKIRK: Why should it not be included?

"MR. DANIELS: $21,600,000 is the aggregate of all of the property of the American Express Company; $15,501,344.33 is bonds, stocks and notes held in the State of New York and not used in the express business. Our proposition is that that $15,000,000 should be deducted from the $21,600,000, because the difference represents the mileage of lines or routes.

"COMMISSIONER BUSKIRK: That $15,000,000 goes in to repay the capital stock, does it not?

"MR. DANIELS: Yes, but you are not assessing the capital stock. You are assessing the property —the unique form of property which is called 'express lines or routes,' and our proposition is

that that amount does not include any physical, tangible property, like bonds and notes, not used in the Express business" (p. 206).

Certain questions were asked by the Commissioners concerning the inclusion by the company of its ocean routes in its total mileage, and at the end the chairman said: "We will take this matter under consideration."

The above includes all that was said on the subject of the company's property.

The following day the Commission met and denied the application of the company to modify the assessment (Record, p. 207).

Such were the proceedings for the year 1898.

In the following year, 1899, the company made its return in the same form as that above stated. By reason, however, of an increase in the market price of the capital stock, it was unable to show that it had no tangible property whatever.

By this return its capital stock of $18,000,000 was shown to be worth 140—

| | |
|---|---|
| Equivalent to | $25,200,000 00 |
| Its tangible property of the same character as that shown in the former return was shown to have a market value of | 23,248,005 31 |
| Leaving as the total of its intangible property | $1,951,994 69 |

Upon this return the board made the same assessment of $450 a mile as in the former year, making a total assessment of $809,253, which was equal to 41 per cent. of the entire intangible property of the company, whereas the Indiana mileage was but a trifle over one per cent. of the total mileage of the company,

if its ocean lines were included, and a little over five per cent of its total railroad mileage alone.
Record, page 272.

Again the company filed a written protest similar to that which had been filed the year before (Record, page 249). Again it appeared before the board by counsel.

The proceedings which then took place are set forth on pages 212 to 253. The attention of the Court is particularly called to these proceedings, because we claim that it appears upon the face of them that there were but two questions at issue between the company and the State Board : First, whether the ocean mileage could be included in the total mileage. Second, whether the foreign-held and foreign-situated assets, real and personal, must not be excluded from the assessment made by the board ; and that it was assumed both by the board and the company's representatives upon this hearing that the assessment of $450 per mile *did* include the tangible property of the company situated outside of Indiana.

Counsel for the company (Record, page 214) after referring to the remark of Mr. Justice BREWER on the petition for the rehearing in the Ohio cases in the Supreme Court of the United States, to the effect that there was no proof before the Court that the company possessed tangible investments in New York, said :

> " On that suggestion, last year the American Ex-
> " press Company filed a statement showing that over
> " fifteen million dollars, out of the twenty million
> " dollars of value of its capital stock, was invested
> " in bonds and stocks, and money loaned and at
> " interest on mortgages, and in large buildings in
> " Buffalo, New York and other places, that were
> " rented to other people—office people and the
> " like. We offered then to exhibit these things,
> " or to make such proof as the Board might wish,
> " if they have any doubt as to whether they were

" in existence and not in use in the express busi-
" ness. The Board did not call for any other
" proof, and we imagined then, and imagine now,
" *it was not a question of fact that the Board dis-*
" *tributed this on, but a question of law, purely.*
" In other words, that the Board thought, that be-
" ing true, whether this property is used in the
" express business or not, as long as it gives value
" to this stock—and it certainly does that—be-
" cause its dividends are paid out of the earnings
" of this property, when the Express Company
" loses money as it does at times; that if this
" property is adding value to the stock, it is im-
" material whether it is used in the express busi-
" ness or not, that it is owned by the Express
" Company, and therefore we will apportion that
" value to the miles in this State. That is what
" the Board, in effect, said. We then appealed to
" the Court. We asked for a preliminary injunc-
" tion from Judge Woods. It was granted. There
" was a motion made then by the Attorney-Gen-
" eral to dissolve that injunction. It was fully
" argued and that motion was denied, and the
" injunction still stands. Now, it seems to me,
" that the main question before the Board that
" we wish to present is this: Whether or not the
" Board will follow the suggestion of the Supreme
" Court of the United States, as I ask you to do,
" and allow out of this total value, the value of
" this property, real and personal, which is not lo-
" cated in Indiana, and which is not in any way
" connected or used in the express business. Be-
" fore reading these affidavits I have here, I want
" to say there is one practical suggestion I wish
" to make, and I think in this possibly the Attor-
" ney General will join me. I have had several
" conferences with the Attorney General about
" the National and American pending cases, and if
" this Board thinks the law is as it thought last
" year, and intends to include this year the non-

" express property in the valuation, it would be
" a great accommodation to us, and I think it
" would be to the Attorney General, if that fact
" could be known not very far hence, because
" then another suit of course will have to be
" brought. Exactly the same question will be in-
" volved, but you cannot include the two taxes in
" one suit, and it will require the drafting of a
" new appeal and the Attorney General has
" assured us he will, so far as possible, accommo-
" date us, in the way of saving the labor of getting
" the papers in form, in presenting the question
" twice. If the Board abides by its opinion of
" the law, I now wish to read two affidavits that
" were filed in support of the appeal in the
" American Express case before Judge WOODS, and
" to say that we will leave copies of them with
" the Board. * * * These were made with
" reference to the appeal on the 1898 assessment.
" I want to say further that we are informed by
" the General Manager of the American Express
" Company, that these properties are still in their
" hands, just as they were then; that the condi-
" tions are substantially the same, except that
" some of them are slightly increased in value
" and that we offer now to make a further show-
" ing on that subject, if the Board shall have any
" doubt of that fact."

He then submitted the affidavit of James C. Fargo (Record, page 216) in the suit already then pending to restrain the 1898 assessment. This affidavit first stated the facts upon which the company claimed the right to include its ocean routes as part of its total mileage. It then showed (pp. 218, 219) that the tangible securities of the company held by it in the City of New York were held as mere investments, and that they were not used in the business of the company.

He further put in evidence the affidavit of Mr. Clark, made in the same suit, which corrected a clerical

error in the 1898 return, and had annexed to it a detailed tabulated statement showing the items going to make up the tangible investment securities of the company held in New York; also an affidavit of James F. Fargo, the assistant treasurer of the company, showing its investments and the fact that they were not used in the business of the company, and that they were situated outside of Indiana, and that they were not needed by the company as a basis of credit in its business (Record, pp. 225, 226). Then the following proceedings took place (Record, p. 227):

"MR. WRIGHT: That fourteen million and some odd dollars is the surplus?

"MR. BAKER: It is the accumulated profits; it is more than fourteen million; that much personal property and the real estate. I don't suppose there is any question about that. I did not read that part of the affidavit; the real estate that is used for rental purposes. In other words, a company with five million dollars of property has enough for the express business.

"MR. WINGATE: Is your personal property taxed in the cities where it is located?

"MR. BAKER: If the officers do their duty, just as you do, and I expect they do.

"CAPT. HART: You have not submitted any affidavit that this property is taxed in New York, have you?

"MR. BAKER: I don't think there is anything on that subject. It says it is there.

"I imagine that is not a proper subject of inquiry for the taxing officers in Indiana. * * *

"MR. TAYLOR, the Attorney General (page 231): Now, it becomes a question of fact, doesn't it Mr. Baker, whether or not this property you speak of, fifteen million dollars of personal property, bonds, stocks, notes, &c., and real estate, is in any way used in the express business?

"MR. BAKER: Of course it does, and you have

no affidavits before you, and no evidence that contradicts mine, and you will not have.

* * * * * *

"MR. TAYLOR: * * * The Supreme Court of the United States, in discussing this express question and every conceivable question that is presented here, except this one of mileage and the one that Mr. Baker suggests—and that is *that the personal property ought not to be charged to the company*—was taken up and passed on, and decided in a most elaborate opinion by the Supreme Court of the United States. The case went up from Ohio; the Indiana case went up with it, and a Kentucky case went up with the other two. The Ohio case was the first one filed, and it took the right of way. The Company claimed that they should only be taxed on their personal property in the State of Ohio, amounting to about $34,000, while the net earnings in that State were $300,000, and the opinion of the Supreme Court was a strong and vigorous one, and on the petition for a rehearing again the court rendered another very elaborate opinion, and they held that the assessing officers *have a right to assess these companies on a mileage basis. That has been the rule in the United States ever since. They are to be assessed the same as telegraph lines and railroads and Pullman cars; it is the same proposition.* But now the Supreme Court, in rendering the opinion, say they must presume that all of the personal property of the company goes to make up its assets, and is used in the business, presumably, and *they discuss precisely the question Mr. Baker here presents, and the Court says, presumably, all this property is used, and must be taken into consideration in the conduct of its business.* * * * In the original case they discussed the question, and in the minority opinion in the original case they also referred to it, and when it came up on the petition for a rehearing, they referred to it again, and

*it was because of the way the court handles the question there, this question is again presented, because it was not squarely decided.* * * * Now, as I say, they filed affidavits in the United States court, those that have been read here by Mr. Baker, *in which they raised the question that these fifteen or sixteen million of dollars of personal property, bonds and stocks, ought not to be assessed throughout the United States, because they are not used in the express business.*

"MR. BAKER: Ought not to be assessed in Indiana.

"MR. TAYLOR, the Attorney-General: It means all other States except New York, *because they say the stuff is there—ought not to be assessed in any State except New York, because the personal property is all in New York, and not used in the express business*" (page 232).

Thereupon the Attorney-General filed before the board the affidavit of Mr. Daily, the Auditor of State (Record, p. 233), which after certain statements relating to the company's right to include the ocean routes in its total mileage, stated, merely upon information and belief, and without disclosing in any respect the sources of his information, that if it were true that the American Express Company owned stocks and bonds and other tangible property, "all of said personal property was "he d and employed and used by complainant for the "purpose of transacting its express business, and that "such personal property and securities were necessarily "and properly employed in maintaining and continu-"ing said business" (p. 235); that the ownership of such property was necessary *in order to give the company "the credit necessary to enable it to get business"* and finally, that "so much of the American Express "Company's capital as is invested in securities of the "sort named, is *used and employed not only in and for "the City and State of New York*, but generally in the "management and conduct of the business of said co-

" partnership, and that such securities form a part of " its capital and a part of its business, and are in con- " stant use wherever said Company does business, " whether in the State of Indiana, or in the State of " New York, or elsewhere, and that if such securities " were held and retained absolutely in the City and " State of New York, and were not attainable for the " purpose of meeting liabilities and giving bonds in " other parts of the United States, and especially in " the State of Indiana, it would be difficult, if not im- " possible, for the American Express Company to " secure and successfully transact an expressage busi- " ness in the State of Indiana, and elsewhere than the " State of New York."

Then the assistant general manager of the company appeared before the board and was interrogated concerning the European business of the company and the method of its transaction, as bearing upon the right of the company to include its ocean routes in its total mileage. No questions were addressed to him on the subject of the tangible assets of the company situated outside of Indiana, except that an effort was made (on pages 243, 244) to show that it was necessary for the company to have large assets in order to give it the credit necessary to enable it to give bonds required to be given in the course of its business, but it appeared from the witness that no such bonds were required, except one to the Government for the transportation of bonded goods.

Proceedings for the years 1900 and 1901 are found at pages 254 and 382 of the record.

At no time did the board express any dissatisfaction or doubt concerning the statements rendered by the company, nor was any evidence received by the board in disproof thereof, with the single exception of the wholly ineffectual attempt to show that, because the possession of securities increased the company's credit, therefore, the securities, although situated outside of Indiana, might be said to be used in the business; but, so far as the

facts shown were concerned, the value of the company's property and its assets, and the value of its capital stock, no proof whatever was before the board other than what was contained in the statements rendered by the company (Record, p. 306).

Is it possible for any one to read these proceedings with any other result than the conviction that, upon the subject we are now discussing, the only question that arose between the company and the board was not one of valuation, but one of what property should be included in the assessment made.

By the returns made the board were apprised that the company was carefully and studiously endeavoring to raise the very question which is presented by this suit, namely, whether under the decisions which the Supreme Court had given, the board were at liberty to include in its assessment of the company's property in Indiana, any tangible property having a definite situs without that State, whether used in the business or not. This issue was distinctly raised by the company in its returns, in its written protest, in each year, and in the arguments of its counsel before the board. At this hearing the Attorney-General of Indiana, the official representative of the State and the official legal adviser of the Board of State Tax Commissioners, was present. He made no claim that the question before the board was one of the amount of valuation. He distinctly stated to the board what, according to his understandiug, had been established as matter of law by the decisions of the Supreme Court in the Ohio, Kentucky and Indiana cases. He instructed the board that it was their duty to assess the property *upon a mileage basis ;* and when the question had been again and again presented, as to whether the tangible assets situated outside of the State could be included in the value thus to be apportioned upon a mileage basis between Indiana and other States, he said to the board that it was "*because this*

"*question had not been squarely decided*" by the Supreme Court, although raised and referred to by it, that it was now again presented. And he called the board's attention to the fact that this Court had said, in the opinions referred to, that presumably all the property of a company was used in its business, which was equivalent to advising the board that, unless this presumption was overcome by proof, they were entitled and obliged to include it in their assessment, irrespective of its situs.

The Attorney-General and the State Board both knew, beyond any possibility of doubt, exactly what the question that the company was raising was. It had been raised in its returns and protests in writing in the most definite and precise form, and nothing can be plainer upon the face of the proceedings of the two years, 1898 and 1899, as shown in the record, than that it was assumed by all parties, by the Attorney-General, by the board and by the company, that the assessment of $450 per mile did, in fact, include the tangible assets of the company situated outside of Indiana, and they knew, moreover, that a suit had been brought, and other suits were to be brought, for the purpose of determining that precise question, and it was because, in the view of the Attorney-General, it had not been determined adversely to the State in the opinions already rendered by the Supreme Court, that he felt at liberty to advise the board, for we think the record cannot be read otherwise than as amounting to the giving of such advice, that they should include these extra-territorial tangible assets in their assessment.

It hardly comports with the frankness which we might justly expect from such a litigant as a representative of the sovereign State of Indiana that, in the face of such a record, evidently intended by all parties to be the basis of a test suit under which the validity of her acts in taxing the property of this company should be determined, she should now seek to avoid all determination of such question and resort to the somewhat shifty argument

that what is really presented by this record is not what the parties understood, nor what either of them understood or intended, but that, because we are not at liberty to inquire into the mental processes of the Taxing Board, therefore, we must be content to go without remedy, because, forsooth, their determination upon a question of mere value may not be reviewed.

2. Another method of showing that, as a matter of fact, the State Board did include this tangible foreign-held and foreign-situated property in the valuation made by it of the company's property in Indiana, and one of a most convincing character, is found in an examination of the actual results of the action of the board.

The reports made by the company for the years 1898, 1899, 1900 and 1901 set forth, as required by law, the value of the capital stock on the first day of April in each year. At the time of the making of these respective assessments no question was raised by the board concerning the correctness of the value placed upon the stock, and, as we have seen, the Indiana statute made this value a controlling test, and the only test, by which the board should arrive at the valuation of the entire property of the company.

With respect to the ratio of the mileage within the State to the total mileage of the company, there was a question between the company and the board as to whether the company was entitled to include its ocean routes in its total mileage. It was plain from the observations of the board upon the various hearings that it was not inclined to allow the ocean mileage to be included in the calculation.

The following computations are, therefore, submitted, made out in both ways: First, with the ocean mileage included, and secondly, with the ocean mileage excluded. In the first case, allotting to Indiana the proportion of the company's property in the ratio of

Indiana mileage to total mileage, including ocean routes, and in the second in the ratio of Indiana mileage to the total mileage of the company, exclusive of ocean routes. We have then these results:

1898.

| | | |
|---|---|---|
| Total mileage, less National Express lines | | 162,648 30 |
| Indiana mileage | | 1,798 54 |
| Proportion Indiana to total mileage | | .011% |
| Capital stock $18,000,000 at 120 | | $21,600,000 00 |
| Foreign real estate not used in business | $1,983,534 30 | |
| Foreign real estate not used in business | 3,076,438 00 | |
| Foreign securities | 15,501,344 33 | |
| | | 20,561,316 63 |
| | | $1,038,683 37 |
| Indiana's percentage on mileage basis, .011 per cent. is | | 11,425 51 |
| Deduct assessed value Indian tangible property | | 16,015 00 |
| Leaves | | 0 |

Excluding ocean routes, the mileage in Indiana would be .05144 per cent. of the total mileage, and the assessment per mile would still be 0.

1899.

| | | |
|---|---|---|
| Proportion Indiana to total mileage, .011 per cent. | | |
| Capital stock, $18,000,000, at 140 | | $25,200,000 00 |
| Foreign real estate not used in business | $2,026,747 88 | |
| Foreign real estate not used in business | 3,094,545 28 | |
| Foreign securities | 16,600,120 95 | |
| | | 21,721,414 11 |
| | | $3,478,585 89 |

| | |
|---|---|
| Indiana's proportion on mileage basis, .011 per cent., is | $38,264 44 |
| Deduct assessed value Indiana tangible property | 16,334 00 |
| Total value assessable in Indiana | $21,930 44 |

equivalent per mile to $12.

Excluding ocean routes, the mileage in Indiana would be .05144 per cent. of the total mileage, and the assessment per mile would be $90.

1900.

| | | |
|---|---|---|
| Proportion Indiana to total mileage, .011 per cent. | | |
| Capital stock, $18,000,000, at 140 | | $25,200,000 00 |
| Foreign real estate not used in business | $2,026,747 88 | |
| Foreign real estate not used in business | 3,094,545 28 | |
| Foreign securities | 18,640,461 13 | |
| | | 23,761,754 29 |
| | | $1,438,245.71 |
| Indiana's proportion on mileage basis, .011 per cent., is | | $15,820 70 |
| Deduct assessed value Indiana tangible property | | 15,724 00 |
| Total value assessable in Indiana | | $96 70 |

equivalent per mile to 0.

Excluding ocean routes, the milage in Indiana would be .0523 per cent of the total mileage, and the assessment per mile would be $32.

1901.

| | | |
|---|---|---|
| Proportion Indiana to total mileage, .011 per cent. | | |
| Capital stock, $18,000,000, at 150 | | $27,000,000 00 |
| Foreign real estate not used in business | $2,026,747 88 | |
| Foreign real estate not used in business | 3,081,672 06 | |
| Foreign securities | 19,259,933 53 | |
| | | 24,368,535 47 |
| | | $2,631,646 53 |
| Indiana's proportion on mileage basis, .011 per cent., is | | $28,948 11 |
| Deduct assessed value Indiana tangible property | | 17,455 00 |
| Total value assessable in Indiana equivalent per mile to $6. | | $11,493 11 |

Excluding ocean routes, the mileage in Indiana would be .0528 per cent. of the total mileage, and the assessment per mile would be $65.

3. The foregoing computations do not include in the tangible property of the company any of its equipment, consisting of horses, wagons, safes, supplies and the like.

But if we correctly interpret the opinion of this Court rendered upon the motion for re-argument in the former cases, such a system of legislation as that of Indiana, as applied to express companies, can, having regard to the nature of their business, operate only upon the *intangible* property of the company, for that is the only property which has not a definite situs. In this respect the case differs from those arising upon similar statutes designed to operate upon railroad or

telegraph property, where the thing valued is a single physical unit.

In the case of a railroad, it is impossible to say what value is given to the whole by any part, or what value is given to any part by its inclusion within the whole, because the entire thing is by the hypothesis a unit, and therefore indivisible, although situated partly in one State and partly in another. Therefore, the assessment of the portion lying within any one State upon the basis of the value of the whole is not an importation of values of property lying without the State, even though the portion lying without the State might be somewhat more valuable than that within, considered each as an independent line.

But in the case of an express company, there is no such physical unity, for there is no structure or physical thing lying partly within one State and partly within another, and still constituting a physical unit. The business of the express company consists essentially in the rendering of services, and the business is conducted chiefly through the employment of a vast number of employees. There are certain physical things used in connection with the business, but it is not these physical things which produce the earnings or the profits. They are produced by the services of this vast number of employees.

Still the Court held in the former cases that the physical things, such as horses, wagons, safes, etc., wherever situated, were devoted to a common use, and that there was, therefore, in respect to them a unity of use.

None the less are they tangible property having a definite physical situs, and subject to taxation as tangible property wherever that situs is.

The fact that they are in use in the business does not import them into Indiana or alter, in any degree, the situs which, by the general rules of law, is imputable to them.

Now, it so happens that a very small proportion of this tangible, physical property is situated in Indiana.

The whole amount of it owned by the express company is over one million and a half of dollars in value, of which less than eight thousand is situated in Indiana. Now, if our interpretation of the opinion of this Court is correct, and such a law as that now under consideration can operate only upon intangible property, or good-will, or earning power, and the State has chosen to establish as the standard of the value of the entire property the market value of the capital stock, this tangible property should be added to the other tangible ble property of the company, in order to ascertain whether, when this is done, there remains any excess of value, represented by the capital stock, over and above the aggregate value of the tangible property of the company having a definite situs.

The following tables, for each of the years in question, differ, therefore, from those given above, in that they include in the tangible property of the company the value of these articles of equipment.

Although the State Board did not, either at the time of receiving any return made by the company, or at the time of any hearing before it, question in any way the truthfulness and accuracy of the reports submitted by the company, and particularly in reference to the value of its capital stock, the answer interposed to one of the supplemental bills, although made long after the making of these assessments by the board, contains an allegation as to what the market value of the capital stock of the American Express Company was on the various days as of which the returns were made for the four years in question (page 122). It is alleged that in April, 1898, when the return of the company set forth the value of the capital stock as $120 per share, the market value was $125; that on April 1, 1899, when the company returned $140, the market value was $140; that in 1900 when it returned $140 it was from $149 to $151; that in 1901, when it returned $150 it was $200. This claim that the market value of the stock was otherwise than reported by the company, was

not made till long after, in some cases years after, the assessments in question were imposed. It is fair to say that it appears by the record that there were transactions in the stock at or about the times alleged, at prices corresponding to those now alleged by the appellee (Record, page 394); but it does not follow that these prices constituted or represented in any fair degree the market value of the stock. They were prices for small transactions of fractional lots of less than one hundred shares, and the stock itself, being what is known as an inactive stock, generally held for investment, with a very small amount floating in the market, such transactions are in fact no fair criterion of the market value of the whole of the capital stock of the company. The placing of one thousand shares of this stock upon the market would enormously depress its price.

But, because these allegations are made, the tables which we have now to present are made up not only upon the basis of the prices for the stock returned by the company in its returns for the several years in question, but also upon the basis of the market price for the stock at the several dates mentioned, according to the allegations in the answer of the Auditor of State. The tables are as follows:

## Intangible Property.

1898

| | | | | |
|---|---|---|---|---|
| Capital $18,000,000. at 120=.....$21,600,000. or at 125=$22,500,000. | | | | |
| Real estate not used, market..... | $1,983,534 30 | | | |
| Real estate used market ..... | 3,076,538 00 | | | |
| Securities..... | 15,501,344 83 | | | |
| Plant... | 1,505,788.72 | | | |
| Less that in Indiana | 8,000 00 | 1,497,738 72 | 22,059,055.35 | 22,059,055 35 |
| | | | 0 | $440,944 65 |
| Indiana Assessment 1798.34 miles at $450=. ..... .... | | | | $809,253.00 |
| Indiana proportion total mileage..... ..... | | | | .011% |
| " " Railroad mileage..... ..... | | | | .05144% |

1899

| | | | |
|---|---|---|---|
| Capital $18,000,000 at 140=..... | | | $25,200,000 00 |
| Real estate not used, market..... | | $2,026,747 88 | |
| " " used... ..... | | 3,094,545 28 | |
| Securities..... | | 16,600,120 95 | |
| Plant..... | 1,534,591 20 | | |
| Less that in Indiana... | 8,000 00 | 1,526,591 20 | 23,248,005 31 |
| Total Intangible..... ..... | | | $1,951,994 69 |
| Indiana Assessment 1,798.34 at $450=..... | | | 809,253 00 |
| equals 41% | | | |
| Indiana proportion total mileage..... ..... | | | .011% |
| " " Railroad mileage..... ..... | | | .05144% |

1900

| | | | |
|---|---|---|---|
| Capital $18,000,000 at 140 = 25,200,000.00 or at 150 = $27,000,000 00 | | | |
| Real estate not used... | 2,026,747 88 | | |
| " " used ..... | 3,094,545 28 | | |
| Securities..... ..... | 18,640,461 13 | | |
| Plant less that in Indiana..... | 1,589,294 20 | | |
| | | 25,351,048 49 | 25,351,048 49 |
| Total Tangible..... .. | | 0 | 1,648,951 51 |
| Indiana Assessment 1,830.35 miles at $450. ..... | | | 823,657 50 |
| exceeds 50 per cent. | | | |
| Indiana proportion total mileage | | .011% | |
| " " Railroad " | | .0523% | |

1901

| | | | |
|---|---|---|---|
| Capital $18,000,000. at 150 = $27,000,000 or at 200 = $36,000,000 00 | | | |
| Real estate not used... | $2,026,747 88 | | |
| Real estate used..... | 3,081,672 06 | | |
| Securities..... ..... | 19,259,933 53 | | |
| Plant less that in Indiana. ..... | 1,651,321 74 | | |
| | | 26,019,675 21 | 26,019,675 21 |
| | | $980,324 79 | $9,980,324 79 |

Indiana Assessment 1,848.45 at $450. = $831,802.50 or 84% of the first and about 10% of the latter.

Indiana proportion total mileage .011%
" " Railroad " .0528%

4. From the foregoing it will be perceived that it was an absolute impossibility for the State Board of Tax Commissioners to arrive at the value which they imputed to the company's property in the State of Indiana, without assessing and including in such valuation tangible property situated without the State. In 1898 and 1900 the enormous assessment of over $800,000 was *upon intangible property which had no existence whatever.* In 1899 the Indiana per centage of mileage being either about one per cent. or about five per cent., according as to whether the ocean mileage is included or not, *the assessment represented 41 per cent. of the total value of the intangible property, and in 1901 it represented 84 per cent. of it.*

It should not be forgotten that there was no question raised at the time concerning the accuracy of any of the figures, so that the factors which must enter into the calculation are established, and not the subject of doubt.

The valuation of the intangible property of the company, which, upon admitted factors, is shown to be impossible to be arrived at without the inclusion of property which is beyond the State, is no longer a valuation of property within the State, and the

question which an attack upon it presents is no longer a question of excessive valuation of property within the State.

5. The appellee must be driven to the choice of an alternative. It having been shown that, upon admitted factors which must enter into the calculation, the result could not be arrived at without the inclusion of property situated outside the State, it is manifest that either the assessment did include such outside property, or that it was the assessment of a purely arbitrary amount without regard to value.

6. The Court should not fail to observe the arbitrary action of this Board throughout the series of years in question.

The value of the Express Company's stock changed from time to time. Upon the company's own showing it rose from 120 in 1898 to 150 in 1901, an increase of 25 per cent. According to the figures stated in the answer, it rose from 125 in 1898 to 200 in 1901, an increase of 60 per cent.

So, too, the assets of the company changed from time to time. Its tangible assets increased, and, through the rise in value of its capital stock, its intangible property also increased. The proportion of mileage in Indiana to the total railroad mileage of the company also changed from time to time, although slightly.

None of these changed conditions resulted in any corresponding change in the amount of the assessment made by this Board. Rigidly and persistently each year the same assessment of $450 per mile was made, and this in the face of the most complete and frank exposure of its affairs by the Company.

## Fourth Point.

We submit, with a great deal of earnestness, that there is no escape from the demonstration that what *the State Board actually did, throughout this* series of years, was either to include in the assessment of property within the State that which was tangible and had an actual situs without the State, or to make an arbitrary assessment of over $800,000 each year, without any foundation or basis in fact, without any justification in law, and purely as the result of their own whim and caprice.

If what they did was the former, then the assessment is void for reasons which we have already presented.

If what they did was in fact the latter, then their action is void as being in violation both of the Commerce Clause and of the Fourteenth Amendment. It is a violation of the Commerce Clause because the business of the express company is largely interstate business, and an arbitrary tax upon the company not laid upon its property or its franchise, or based upon either, must be an illegal burden upon interstate commerce. It is a violation of the Fourteenth Amendment because, under the guise of a tax upon property, what the State has actually done is to impose an arbitrary and capricious tax for which there is no pretense of any basis or justification in the law.

The history of these proceedings by the Indiana State Board furnishes an instructive commentary upon what was said in an earlier part of this brief.

In discussing the terms of the statute of Indiana under which this assessment is sought to be justified, we said that in express words it laid down a rigid and inflexible mathematical process to be adopted by the board, and we observed that it was not a sufficient answer to say that by a strained construction, such as that adopted in the case of Western Union Telegraph Company vs. Taggart, 141 Indiana, the Supreme Court of

that State had construed the statute as laying down no such inflexible rule, but as conferring upon the taxing authorities the necessary discretion to make such deductions as were requisite in order to save the statute from constitutional condemnation. The *Supreme* Court of Indiana said that it would be the duty of the assessors to "*consider*" such exceptional circumstances as might be presented to them. How have they "considered" them in this case? Is it not manifest that they have regarded themselves as bound, not by the construction of the statute laid down by their Supreme Court, but by its express terms? How can it be claimed that they have discharged this duty of "consideration?" "Consideration," without result and without effect, furnishes little protection to the citizen whose rights are invaded.

Observe how the process has worked. In each of these years there was an assessment of more than $800,000. Granting the contention of the appellee that the ocean mileage should be excluded from computation, Indiana's proportion of the total railroad mileage of the company would be a little more than 5 per cent. If every State in which the company did business taxed the intangible property upon the same basis, the total assessment upon that score would be $16,000,000; but this would represent the intangible property alone, and every State in which the tangible property was situated would have an undoubted right to tax the latter also. Now, during the period in question, the tangible property of the company was of the market value of from $22,000,000 to $26,000,000, and, assuming that none of it was represented by tax exempt securities, we must add an assessment of from $22,000,000 to $26,000,000, *making a total assessment upon the property of this company of from $38,000,000 to $42,000,000 when the entire value of all its property, tangible and intangible, as evidenced by the market price of its whole capital stock, was from $21,600,000 to $27,000,000.*

For example, take the year 1898. Upon the Indiana basis the total assessments upon which this company

would be called upon to pay taxes would be $38,000,000, while the entire value of its capital stock did not exceed $21,600,000, or, taking the most extreme figures claimed by the appellee, $22,500,000, *a valuation for the purposes of assessment of not less than $15,500,000 in excess of the company's entire property.*

And yet, our learned opponents say that we are without remedy, and that these extraordinary results, unjust as they may be, must stand, because the statute is constitutional and the question presented is simply one of an excessive valuation of our property within the State of Indiana! Of what value are constitutional guaranties and privileges under a system where such results are possible? When a State passes an act the adminstration of which leads to such outrageous injustice, are we to be without remedy simply because the Supreme Court of that State has so construed its statute as to induce the Federal Court, following that construction, to say that the law itself does not violate the Constitution? If we are not entitled to a remedy in such a case, then surely our constitutional guaranties are of little avail against the arbitrary action of State authority.

## Fifth Point.

The learned Judge in the Circuit Court held that no fraud was proved on the part of the State Board, and that its determination, either as to the value of the company's property or the company's right to include its ocean mileage, could not be impeached except for fraud.

1. We think that we have already shown that what the board did was to *act without jurisdiction.* If that be true, then it is immaterial whether its action was fraudulent or not, for it cannot stand. That this is the

law in Indiana is shown by a recent decision of its highest court.

*Hart vs. Smith*, 159 Ind., 182.

This case involved the validity of an assessment made by the State Board of Tax Commissioners against the property of a copartnership engaged in publishing a newspaper.

The assessment was based in part upon the good-will of the business. The action brought was in the same form in which the present suit is framed, being a suit to restrain the Auditor of State from certifying the assessment to the County Auditor. The Supreme Court of Indiana held that, in the case of a newspaper, the legislation of that State did not authorize the State Board to assess, as part of its property, the good-will of a partnership conducting such newspaper. There, as here, the objection was made that the suit was a collateral attack on the action of the Board, and that its determination was final and could not be impeached except for fraud. The Supreme Court of Indiana said (page 196):

> " * * * such tribunal is nevertheless one of " granted powers; and, if it acts without jurisdic- " tion, the courts have power to arrest the con- " sequences of its acts. In State Board, etc., v. " Holliday, 150 Ind., 216; 42 L. R. A., 826, this " court sustained a proceeding to enjoin the state " board from listing and valuing the life in- " surance policies for taxation that were held by " the appellees in said action. In Senour v. " Ruth, 140 Ind., 318, 321, this court, in answer " to the claim that the appellee therein " was precluded by the action of the " county board of review, said: ' When we " ' have found that the property was not " ' within the jurisdiction of the State, we have " ' found the absence of an element necessary " ' to the validity of the board's action, and, in " ' such case, the action is void, and may be at-

" ' tacked collaterally.' The proposition that " courts may relieve from assessments laid with- " out jurisdiction finds support in the authorities " without this State " (citing numerous author- ities). " In Central Pac. R. Co. v. California, " *supra*, the Supreme Court of the United States " said: ' Undoubtedly if the board of equalization " ' had included what it had no authority to as- " ' sess, the company might seek the remedies " ' given under the law to correct the assessment, " ' so far as such property was concerned, or re- " ' cover back the tax thereon, or if those remedies " ' were held not exclusive, might defend against " ' the attempt to enforce it.' Judge COOLEY " recognizes that the courts may relieve from an " assessment when some principle of law is vio- " lated in making it, and when the complaint is " not merely of an error in judgment (COOLEY, " Taxation, 748, 777, and notes on pp. 750, 776).

" We think that in a case of this kind it is not " proper to apply the rule that obtains when a " judgment of a court of general jurisdiction is " collaterally attacked—that the infirmity must " appear on the face of the record. These pro- " ceedings are summary, and, to a large extent, in- " formal, and there are no pleadings that tend to " make the question decided certain. It is proper " in a case like this, where values have not been " extended on the specific items of the taxpayer's " schedule, to show affirmatively that he was " assessed with an item that was not taxable " under the laws of the State. * * *

" It is our conclusion, as it is alleged that the " good-will of appellees' business was assessed, " and as there is no means of determining the " amount of that portion of the increase that the " state board of tax commissioners had authority " to add, that the action of said board as an en- " tirety, in so far as it added to appellees' assess- " ment, was properly held to be invalid."

2. If, however, it were necessary to prove fraud, in fact, we submit that this record is amply sufficient upon which to found such a finding.

The fraud necessary to impeach the determination of such a board is not necessarily that species of fraud involving moral turpitude. It is legal fraud. Thus, if the statute commanded the board to make certain deductions, and it refused to make them, this would be such misconduct on its part as to be equivalent to fraud, and would have the same effect in invalidating their proceedings and laying them open to inquiry. So, if, instead of proceeding according to the statute, they arbitrarily assessed upon this interstate carrier a fixed sum, without any authority of law whatever, must we place the name of fraud upon such conduct in order to make it of a character to invalidate the proceedings of the board and render their conclusion open to inquiry and review by the courts? So, too, if the conclusion reached by the board shows a result enormously in excess of that warranted by any of the factors which they were at liberty to use in their calculations, that circumstance would be proof of such misconduct on the part of the board as to deprive their action of any weight whatever. This precise question was decided by the Supreme Court of Minnesota.

*State vs. London and N. A. Mortgage Company*, 80 Minn., 277, 284.

In this case the defendant was assessed in the sum of a million dollars. It appeared before the board and denied that it had any property subject to taxation. By the evidence taken in the suit it appeared that the true value of the property in St. Paul, which the assessor had estimated at one million dollars, was but sixty-two thousand dollars. The face value of certain credits was three hundred and one thousand dollars, but it appeared that they were, in large part, not collectible. The Court below reduced the assessor's valuation from one million to the face value of the credits, but declined to make a further reduction, upon

the theory that it was the duty of the assessor, rather than of a court, to estimate valuations. The Supreme Court of Minnesota said:

"We concur in the view that a reduction should "have been made, but the reduction was not sufficient, and we are not satisfied with the reasoning of the court in this respect. If articles of "personal property are assessed, and their valuations fixed by the assessor within the range of "reason and justice, such estimated values would "be entitled to great respect; but the theory of "the trial court that, even if the assessor had assessed an article of personal property at what "is apparently ten times its actual value, it cannot be reduced by the court, is unsound. *We "have no doubt that such excessive valuation, in "violation of reason, justice, and common sense, "would convict the assessment of such lack of "the element of judgment as to require interference by the judicial power to correct "it.* As to notes and bills receivable, the reason "for judicial interference is still stronger. "Seventy-three thousand dollars, in round numbers, is a large sum. The Court below found "that bills receivable to this amount in one instance were wholly worthless; of no more value "in fact than counterfeit money, or obligations "upon which the statute of limitations had run, "To say that because the assessor returns that "sum, and the board passes such worthless stuff "at its face value, the Courts cannot correct the "palpable injustice, shocks every sentiment of "fair play, and leads to the inquiry whether a "Court can act at all in the premises to prevent "the most arbitrary acts of confiscation. "Whether we treat the constitutional declaration "in section 3, article 9, that laws shall be passed "'taxing * * * property according to its "true value,' as requiring legislation to effectuate

" it or not, it is clear that under this provision in
" our fundamental law—which is essential to jus-
" tice and good government—any interpretation
" of our taxing statutes requiring an arbitrary as-
" sessment of property largely in excess of its
" known and admitted value to pass judicial in-
" quiry would be a palpable violation of its true
" purposes and cannot be tolerated upon
" any principle of justice or equity. * * *
" It is to be presumed, of course, that the as-
" sessor as well as the board of equalization will act
" fairly, and where, within the reasonable range of
" inquiry, there is latitude for a difference of esti-
" mations as to values, the court in such cases
" will not interfere with their conclusions; but
" when, as in this case, an assessment has been
" for an exorbitant amount, and it is apparent
" that no judgment at all has been exercised, it
" must be evident that either a demonstrable mis-
" take of fact has occurred or a gross injustice
" has been intentionally perpetrated; and we hold
" in every such case the power of the court is suf-
" ficient to correct the wrong, and that it should
" not hesitate to do so."

## Sixth Point.

It is disclosed by the proceedings of the Board, as well as by the answers of the defendant to the bill and and supplemental bills, that a principal reason why the Board included the tangible property of the Company without the State was because it was, as they thought, used in the business of the Company. By this they evidently mean that the possession of these properties by the Company gave it an established credit, which enabled it more successfully to prosecute its business,

for there was not a scintilla of evidence to show that it was in any other sense used in the business. The proof on this point was overwhelming and conclusive.

1. For reasons which we have already stated, it is quite immaterial whether these properties or any of them, were used in the business of the company, or not. To whatever extent they might be used in the business, such use could not alter their physical situs as things. Bonds, stocks, securities, to say nothing of real estate and chattels, are tangible property, capable of having, and thoroughly well recognized in the law and by decisions of this Court as having an actual situs where they exist.

New Orleans vs. Stempel, 175 U. S., 309.
Blackstone vs. Miller, 188 U. S., 189.

2. But while we regard the point as to whether these properties were or were not used in the business as immaterial, we submit that, upon the evidence before the Board, it was bound to find, and upon the evidence presented to the Court below *it* was bound to find, that a large amount of the real estate of the company, and all its stocks, bonds and securities situated in the City of New York, were properties which were not, in any sense, used in the business.

These properties had been acquired by the company through the accumulations of many years. From time to time it had invested such of its earnings as were not distributed in dividends to stockholders, in bonds, stocks and other securities, and in real estate, all of which were held in precisely the same way as similar investments are held by individuals. True, they are at the risk of the business in the sense that they belong to the company, and that all its property is liable for its engagements; but in this sense they are no more employed in the business than are the private investments of a merchant a part of the capital which he has embarked in business. They have no relation to the express business. Their

possession, it is true, may give a standing and responsibility to the company which it would not otherwise have, but it is precisely such a standing and responsibility that enables it to acquire business and results in the creation of the intangible property which, as this Court says, such statutes may fairly reach.

The returns of the company and the evidence laid before the board in the affidavits of the officers of the Company (Record, pp. 216, 220 and 225) show that these properties were not used in the business and sustained no relation to the business whatever. The testimony of Mr. Flagg (Record, pp. 169–193) and of Mr. Ledyard (pp. 317–327), taken in the court below, to the same effect, was uncontradicted.

3. Another circumstance which seemed to play no little part in inducing the State Board to include this extra-territorial tangible property, as evidenced by allegations of the answers in this case (Record, p. 67), and some of the questions put by the Board at the hearing, instances of which are found at page 227, was that these properties were not returned to the City or State of New York for taxation, and that the company was not assessed for personal property in the City of New York.

No such considerations could justly be allowed to have any weight whatever in determining the assessment to be made upon the company's property in Indiana. The duty of the Board was confined to assessing the property within the State, and the moment that any given property was found to be of a tangible character and situated without the State, then, so far as that property was concerned, it was an end of the matter. It was not open to the board to inquire whether such properties were or were not actually taxed in the States in which they were situated, because, whatever the answer to such inquiry might be, it could not be considered by the board in performing the duty which was before it.

Nevertheless, as the members of the State Board, in

the proceedings before it, and the learned counsel for the defendant, in drawing the answer to the bills of complaint and in the taking of the testimony, seem to have attached much importance to this point, it is well that the Court should understand what the fact about it is. Of course, the attempt is to show an evasion of just taxation by the American Express Company, but the attempt is founded upon an utter ignorance of the system of taxation and the law of taxation in the State of New York.

(*a*) It is perfectly true, as alleged in the answer (Record, page 57) that no returns of personal property were made to the State, County or City of New York by the American Express Company.

The reason is that the system of requiring taxpayers to make returns to assessing officers does not exist in the State of New York.

(*b*) It is also true, as alleged in the answer (Record, page 57) that neither the name of the American Express Company nor that of its president appears upon the tax rolls of New York City as assessed for personal property.

The reason is that, under the law of the State of New York, whatever personal property subject to taxation the American Express Company has, is taxed not against the company, as is the case with corporations, but against its shareholders, because the company is a partnership, and its shareholders are partners, and, as in the case of members of other partnerships, the partnership property is assessed to the several members of the firm.

See *People on relation of Winchester vs. Coleman*, 133 N. Y., 279,

where it was held that, for the purposes of taxation, an organization like the American Express Company is to be dealt with as a partnership.

(*c*) It is, therefore, wholly untrue, "that no taxes "were assessed or paid in the City of New York upon

" the specific personal property described in the bill, " or that the refusal of the company to pay the pro- " portion of the taxes alleged to be due on its prop- " erty " in Indiana was an attempt to evade the payment of any taxes justly due (Record, page 57).

*(d)* The defendant further alleged in its answer that the Express Company returned to the Comptroller of the State of New York its capital employed in New York State as $2,916,000 for the year 1898 (Record, page 57), doubtless for the purpose of suggesting that such a return amounted to a concealment of the very large amount of tangible assets, exceeding $15,000,000 in value, which the company now claims to have had in the State of New York in that year, and a copy of this report to the State Comptroller of New York is given in evidence at page 397 of the Record.

Here also the defendant has been led into an absurd error through ignorance of the system and law of taxation in force in the State of New York. The law under which the return in question was made was a law imposing a *franchise tax* upon the company.

Under this law the actual assets or property of a company are not considered. In every case where a company makes dividends, as the American Express Company did, of six or more than six per cent. per annum, the tax is calculated upon the *nominal or par value* of the capital, irrespective of its assets, and at a rate depending wholly upon the rate of dividend declared; in other words, it is not a *property* tax. (See Section 182 N. Y. Tax Law.)

(*e*) Moreover, a large part of the securities owned by the American Express Company are exempt from taxation under the law of the State of New York, which exempts from taxation in the hands of the shareholders the stocks of all corporations which pay their own taxes. (See Section 4, subd. 16, N. Y. Tax Law.)

It is worthy of remark, therefore, that the taxation of this tangible property by the State of Indiana not

only subjects to taxation tangible property situated without the State, but tangible property which, by the law of its situs, which is also the domicile of the co-partnership, is wholly exempt from any taxation.

## Seventh Point.

The Court below erred in holding that the question of including the ocean routes of the company in its total mileage for the purposes of the calculation of the Indiana tax, was a question for the exclusive determination of the State Board which could not be impeached except for fraud; and it erred in not holding that, upon the evidence, these ocean routes ought to have been included in the total mileage.

1. The language of the Indiana statute would seem to be plain and to admit of no ambiguity. It requires the company to return to the Auditor of State:

(*a*) "The total length of the lines or routes over "which such Company * * * transports such "merchandise, freight or express matter.

(*b*) "The total length of such lines or routes as are "outside of the State of Indiana."

Horner's Annotated Statutes, Sec. 6521*m*.

In the method which the board is directed to follow in assessing the property, it is provided that

> "said Board * * * shall next ascertain and "assess the true cash value of the property of such "Company * * * within the State of Indiana, "by taking the proportion of the whole aggregate "value of said Company * * * as above as-"certained, after deducting the assessed value of "such real estate without the State, * * *

> " *which the length of lines or routes within the State*
> " *of Indiana bears to the whole length of the lines*
> " *or routes of such Company* * * * and such
> " amount so ascertained shall be deemed and held
> " as the entire value of the property of said Com-
> " pany * * * within the State of Indiana "
> (*ib.*, Sec. 6521*q*).

The rule thus laid down as one for apportioning a part of the intangible property to Indiana, is one which the State has itself chosen to adopt.

That it should result in the apportionment of a smaller part than that which was hoped for or expected by those who framed the legislation, is surely no reason for a perversion or misconstruction of the language used in adopting it.

It is evident, from the pleadings and the remarks of members of the State Board and of the Attorney-General, their official adviser, that they chose to assume, in direct contradiction of all the evidence laid before them, that the inclusion by the company in its returns of these ocean routes in the total mileage was resorted to as a device to escape taxation.

We submit that there is nothing in the evidence before the State Board which could justify any such assumption, and that their finding in rejecting this ocean mileage is so palpably in the teeth of the evidence produced before them, and is shown by the evidence in the case to be so wholly without foundation in fact, that their determination in respect to it is entitled to no weight whatever.

There was but one fact which the Board, as shown by its questions and remarks, relied upon for this assumption, and that was that, for a number of years prior to 1898, the company had returned thirty-five or forty thousand miles as its total mileage, and that in the year 1898, for the first time, by including its ocean routes, it was enabled to show a mileage of more than one hundred and sixty thousand miles, thereby reducing the proportion of the State of Indiana from about

five per cent. to one per cent. of the total mileage of the company.

But there was a reason, and a very good reason, for this change, which is completely and frankly explained by Mr. Flagg in his evidence, and which was explained by the officers of the company at the hearings before the State Board.

The American Express Company, prior to 1898, conducted its express business between the United States and foreign countries in the same way in which the business was conducted by the other principal express companies of the country. That is, when foreign business was brought to it, instead of handling it itself, the company handed it over to a local European express company in New York or Boston, and forwarded it to Europe by such company, and there the matter ended, so far as the American Express Company was concerned.

In 1897, however, the company determined to go into the European business on its own account. It organized a service in Europe, and established offices in London, Liverpool, Paris, Southampton and other principal points in Europe. It made arrangements with steamship lines for the transmission of its express matter over regularly established steamship routes (Record, p. 164). It acquired and maintained in Europe its own equipment of horses, wagons, safes, harnesses, office supplies, etc., corresponding in every respect to similar equipment of the company in this country (Record, pp. 161-165). It issued its through receipt to the shipper and took goods and forwarded them upon its own responsibility (Record, p. 165). The European service was organized upon exactly the same plan and system as that existing in this country. The company's foreign offices are conducted precisely as its offices in New York, Chicago, Boston or Detroit are conducted (Record, page 165). It made contracts and arrangements with the steamship lines under which it received special rates and facilities and specific space in the steamships for the accommodation of

its business (p. 190), the goods being placed in a separate portion of the ship, distinct from the general cargo, being the last goods put on board, so that they are the first goods to be taken out. It pays a special compensation to various employees of the steamship companies for services in connection with the goods forwarded by it (p. 190). On the arrival of goods at the port of destination they are taken out, or received, at the piers by the company's own employees or accredited agents (p. 190). The goods are in direct charge of the purser of the steamship during the transit (189). The earnings from this department of the business, which is called the European Department, are received and passed into the hands of the treasurer, the same as any other earnings from any other branch of the express business transacted in this country (p. 169), and there is no difference in the way in which the business is carried on over these steamship routes and the way in which the business is carried on upon many lake, river and coast lines in this country. In the case of these water routes, the Company does not send a special messenger accompanying the goods as they are in charge of the purser (p. 188), and the same is true of the ocean routes (p. 189), and the same is also true as to a large portion of the transportation by rail in this country (p. 166), where the express matter is guarded *en route* by the baggage master, an employee of the railroad company, who receives special compensation for such services from the Express Company (p. 166).

A schedule of these ocean routes over separate steamship lines with which the Company has thus made contracts, is given at page 187 of the Record.

The Company employs in Europe in its express service, one hundred and twenty-two persons whose services are exclusively devoted to that business, and in addition, it has more than four hundred European agents in foreign countries, who render services to the

Company for compensation paid by the Company (Record, p. 395).

Proofs of a similar character were laid before the State Board (Record, pp. 237, 238, 242, 245).

It is true that the Adams Express Company and the other principal express companies did not include in their returns to the Indiana State Board any ocean routes as part of their total mileage, and that the American Express Company was the only one that did this.

But this was for the reason that it was the only one which had gone into the European business on its own account. This was also fully proved, not only before the State Board (Record, page 242) where Mr. Fargo testified:

> "In other words, at the present time there is "essentially no difference in the transaction of "the business we do over there and the transac- "tion of business here. The operating is done "the same, and we are the only company that do "business in that way in Europe. Of the others "I think about 10 or 12 years ago, the Adams "Express Company experimented, but only in a "small way, and gave it up. They don't think "there is anything in it. We do, and we are "now the agents for the New York Central sys- "tem of railroads. They have freight agents also "in Europe. So that without a thoroughly or- "ganized express system, as we have it here, we "would not be able to conduct at all the business "we are to-day doing in Europe."

but also in the suit, for Mr. Flagg testified:

> "Q. Please state whether or not the foreign "express business, I mean between the United "States and European countries and other foreign "countries, is carried on by any other of the "great express companies of the United States on

" the lines which you have just stated the American " Express Company is using in the transaction of " that business? A. No, it is not. The other " express companies, such as the Adams, the " United States and the Wells Fargo, forward " their business to an agency, whoever he might " be,—some English or French or German firm, " who receives their business for them and dis- " tributes it. They have nothing further to do " than put it on board the ship consigned to their " European agent and that is where their responsi- " bility ceases. I perhaps should qualify that by " saying that I believe the Wells Fargo Com- " pany have maintained at London for a good " many years something in the nature of an agency " which is more or less a part of their business ; " but with that I am not familiar in detail, but " their methods are as I said the same as the " Adams and the United States ; the business is " passed along to the agent who receives it on the " other side of the water" (Record, p. 166).

He further testified that on arrival at destination the goods are treated in the same way whether the destination happens to be Chicago or whether the destination happens to be Liverpool or Paris (p. 167).

It is manifest from these proofs, which were entirely uncontradicted, both before the State Board and in the evidence taken in the Court below, that the European business of the American Express Company was just as much a part of its general express business as that which it conducted on any railroad in the State of Indiana.

It was also evident that it had gone into this business in good faith and with a view to the profit which it might make in it.

Probably not the least inducement to the company's going into the foreign business in the way in which it did, was the circumstance that it would thereby acquire a world-wide reputation ; that its name would be

known not only here, but in Europe and other foreign countries, and it would be enabled to offer, as it does offer to the public, to accept and transmit express matter to any part of the civilized world.

Nothing, by the way, could more directly or efficiently tend to the creation of just such intangible property or value as the State of Indiana seeks to tax under the legislation which we are considering, than the reputation and credit to be gained by the company through so vast an extension of its business and of the territory through which it is known. It is by the exercise of just such intelligent enterprise that the company has attained its present credit and reputation.

The State Board seems to have thought that the establishment of this foreign business in 1897 and 1898 was for the purpose of escaping the operation or reducing the extent of the application of such tax laws as that of Indiana, imposing a tax upon the intangible property of the company in proportion to mileage. That this was not its object is conclusively shown by the circumstance that at the time in question this extension of its routes could have had no such effect. The tangible assets of the company situated outside of the State of Indiana exceeded the total market value of all of its capital stock, and it was, therefore, a matter of perfect indifference to the company whether the Indiana mileage was 1 per cent. or 5 per cent. of the company's mileage, for on either basis there would be nothing whatever upon which to impose any tax.

It is true that by the year 1901 the market price of the company's stock had increased so as to create a surplus of value over and above the market value of its tangible assets. This very extension of its lines to Europe, this exhibition of business enterprise, which, of course, was widely advertised, might have been a large factor in the increase of the market value of the company's stock, which produced the very intangible property which alone Indiana had a right to tax under this statute.

It may have appeared to the Court singular that a company doing such a business as the American Express Company, should have commanded in the year 1898, a market price for its stock in excess of the market value of its tangible assets, but the American Express Company is not a corporation, but a mere partnership. It is not obliged to file, and does not file, any returns of its property, and it makes no formal reports to its stockholders. Consequently, while the company has been known to be prosperous, there has been no exact public knowledge of its actual condition. Doubtless the public would have been surprised to know that the company's actual property was as large as it was. That the market price of its stock increased so greatly between 1898 and 1901, is, not improbably, due, not only to the great extension of the company's business and operations by the establishment of its European Department in 1897, but to the fact that it has made to the State of Indiana the very disclosures contained in the reports shown in this record, which, of course, have been exposed in this litigation, and that thereby the public have obtained a knowledge which it did not before have concerning the actual financial condition of the company.

## Eighth Point.

Certain objections were made in the Court below on the ground of jurisdiction.

1. It was said, that while it is true that the complainant Fargo is a citizen of New York, and the defendant a citizen of Indiana, nevertheless, the suit was really brought on behalf of the American Express Company, and should be considered as a suit by that

company, and that it appeared by the record that there were a few shareholders of the company who were citizens of Indiana, which would be sufficient, it was claimed, to defeat the jurisdiction (p. 305). It was alleged in the bill, and stipulated in the record, that the complainant Fargo was a resident citizen of New York and a shareholder in the company, and also its president. It was proved that at the time the suit was brought there were between three and four thousand shareholders (Record, pp. 147, 148), holding one hundred and eighty thousand shares, of whom twenty-one were residents of Indiana, holding three hundred and sixty-three shares (Record, p. 190).

The American Express Company is not a corporation, but merely the creature of private contract. It derives its authority to exist and its powers from no statute, but simply through a contract between its members. It is admitted in the answer that it is a partnership. The answer says (Record, p. 53): "that said Express Com-" pany was, during all the time mentioned in the said " bill and supplemental bill, and now is, and always " has been, a partnership." It is further admitted (Record, pp. 53, 54), that the partners are widely scattered and live in fifteen or more states of the United States and that some of them are beyond seas.

The suit is in equity, brought by the plaintiff on behalf of himself, as a shareholder, and on behalf of each and all of the other members of the company (Record, p. 2).

That is, it is a representative suit, brought by one of many persons similarly situated, upon a question of common interest to all, and for a relief which is common to all, and the case is one in which to require all to be made parties, would amount, for obvious reasons, to a denial of justice.

In such a case one may sue for all, and the only question that the Court will consider, is, whether the situation of the controversy is such as to justify the belief that he will fairly represent the rights of all.

In such a case, too, the citizenship of the *parties to the record* will alone be considered. In many instances the very circumstance that a joinder with the plaintiff of others having a common citizenship with the defendant would defeat the Federal jurisdiction, has been a ground of the denial of an application that such persons should be made parties. These principles are established by a long line of authorities:

*Stewart vs. Dunham, 115 U. S., 61:* A creditor's bill, where, after removal from the State Court, citizens of the same State as the defendant were brought in by an amendment of the bill. The Court said:

> "This, of course, could have furnished no objection to the removal of the cause from the State Court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the Court, already lawfully acquired, as between the original parties."

*Hotel Co. vs. Wade, 97 U. S., 13.* A bondholders' suit to foreclose a mortgage. A similar objection to that interposed in the present case being made, the Supreme Court said:

> "Holders of such securities * * * are not compelled to join as respondents other holders of similar securities, if resident in other States, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court."

*Payne vs. Hook, 7 Wall., 425.* A bill in equity by one distributee of an intestate's estate. The Court said:

> "If the Court is able to proceed to a decree, and do justice to the parties before it, without in-

jury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit, it will do so.

"The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction. * * *

"The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names other distributees, who have the same common interest, without stating of what particular State they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but with the administrator and his sureties?"

The same principle has been applied in *Society of Shakers vs. Watson* 68 Fed. Rep., 736; *Smith vs. Swormstedt*, 16 How., 302; *President & Trustees of Bowdoin College vs. Merritt*, 54 Fed. Rep., 62.

2. But diversity of citizenship is not the only ground of jurisdiction. Federal questions are involved, and the complainant had a right to resort to the Federal Courts upon that ground alone.

3. It is next objected that there is no jurisdiction in equity; that a bill will not lie to restrain the certification by the State Auditor of an assessment to the County Auditor, but will lie only against an officer whose duty it is to collect the tax, and that in that respect the bill is prematurely filed.

(*a*) It is well settled that whatever remedies are accorded to resident litigants in the Courts of a State, may be availed of by citizens of other States in the Federal Courts within the jurisdiction of such State.

It has been settled by the decision of the highest Court of Indiana that a bill will lie to restrain the certification by the State Auditor to the County Auditor of an assessment for taxation. This was the very form of the remedy in the case above cited of *Hart vs. Smith*, 159 Ind., 182, in which the assessment was held to be invalid, and the decree of the Court below, enjoining the certification of the assessment by the State Auditor to the County Auditor, was affirmed. We are informed that the portion of the brief of the learned Attorney-General, submitted upon this point to the Court below in the present suit, consisted of printed pages taken from the brief used for the State before the Supreme Court of Indiana in Hart vs. Smith.

4. Moreover, the bill in this suit is framed upon that which was filed in *Adams Express Company vs. Ohio*, 165 U. S., in which the former adjudications of this Court were made concerning taxation of express companies. The same objection to the jurisdiction was raised in that case and elaborately argued in the brief of Mr. McDougall, but this Court nevertheless sustained the jurisdiction and decided the cause upon the merits.

5. Irrespective of the law of Indiana upon this subject, it would seem to be too plain for argument that where the taxing authorities of a State set in motion the machinery of the State for the taxing of property without due process of law, their action, prohibited as it is by the Federal Constitution, may be arrested at any stage in the process by the mandate of the Federal Court.

6. In addition, in the present suit the jurisdiction is based upon the prevention of multiplicity of suits, and the removal of a cloud upon the title to the company's real estate in Indiana, through the lien of the illegal tax.

## Ninth Point.

It has often been made a ground of objection in suits to restrain the certification or collection of a tax, that the plaintiff is bound to tender whatever amount may be confessedly due. He may not, of course, enjoin *in toto*, the collection of a tax of which he admittedly owes a portion, for he cannot go into equity without doing equity, and equity requires, as a condition of litigating that which is in dispute, that he should first pay that which is admittedly due.

We do not know whether this objection will be raised in the present suit, but it is evident that it would be totally out of place. The invalidity of the assessment in the present case was total. The assessment was an entire assessment of the company's property in the State of Indiana, at the rate of $450 per mile, and there was no method by which the company, in any year, could ascertain and determine any exact amount due to the State.

The Board disclosed no figures—probably because they were wholly unable to disclose any figures—by which such a result was arrived at.

In certain of the years under consideration there was plainly nothing due, if, as we claim, the intangible property alone was subject to this taxation. As to other years, in which a certain amount of intangible property is shown by the return to have existed, the assessment itself was still entire. The basis of it was

undisclosed by the Board, and there was no method in which any amount due could be definitely or exactly ascertained.

The Company duly paid all taxes assessed upon its tangible property for the years in question (Record, p. 306).

As to the years in which there was no intangible value, nothing was admitted to be due, and therefore no tender could be made. As to the years in which some intangible value was shown, the principles of Santa Clara County vs. Southern Pacific Railway Co., 118 U. S., 394, are applicable. In that case the Court said :

> " If the presumption is that the State Board included in its valuation only such property as it had jurisdiction under the State constitution to assess, namely, such as could be rightfully classified under the heads of franchise, roadway, roadbed, rails or rolling stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for such amount, if any, as was justly due."

And the Court held that the whole assessment was invalid, as it could not be determined what amount was valid.

So, under the law of Indiana, the law governing this particular assessment in controversy in this case, it was held, in Hart vs. Smith (*supra*)—in which the Court decided that the valuation had included property not subject to taxation—that the action of the board in making the estimate was void as an entirety, and that the whole assessment made by the board should be set aside.

**Lastly.**

The decree of the Court below dismissing the complainant's bill and supplemental bills, should be reversed, and a decree entered directing the Court below to enter a decree adjudging the assessments made by the State Board of Tax Commissioners of the State of Indiana, against the property of the American Express Company, for the years 1898, 1899, 1900 and 1901, to be wholly void and invalid, and enjoining the defendant, as Auditor of State of said State, as prayed in the bill and supplemental bills.

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